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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-759

WAYNE L. KIDWELL, Attorney General of Idaho;
TOM D. MCELDOWNEY, Director of the Department of Finance of the State of Idaho,

Appellants,

vs.

GREAT WESTERN UNITED CORPORATION,

Appellee.

BRIEF OF THE STATE OF INDIANA AMICUS CURIAE IN SUPPORT OF APPELLANTS

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The State of Indiana, by Theodore L. Sendak, Attorney General of Indiana, Donald P. Bogard, Chief Counsel, and William G. Mundy, Assistant Attorney General, submits its *amicus curiae* brief in support of the Appellants in the above-entitled cause, pursuant to Rule 42(4) of the Rules of the Supreme Court.

STATEMENT OF THE CASE

The *amicus* accepts and adopts the "Statement of the Case" contained in Appellants' Jurisdictional Statement at pages 8-12.

INTEREST OF THE AMICUS

This brief submitted *amicus curiae* by the State of Indiana will only address the issue of the jurisdiction of the federal district court in this action. Indiana believes that this case reflects an alarming tendency on the part of federal district courts to entertain jurisdiction over any controversy, regardless of where such controversy arises. Such practice has required the State of Indiana, as the District Court below required the State of Idaho, to defend two (2) lawsuits in Texas, well beyond the confines of Indiana's border.

In *Rodriguez v. Marshall,* Civil Action Number 73-B-130, the United States District Court for the Southern District of Texas, Brownsville Division, on December 31, 1975, dismissed Indiana officials from a pending lawsuit, but not until the State's motion had been under advisement for over two years and attorneys for Indiana had made several trips to Texas. A case entitled *Ramiro Rivera, et al. v. Ray Marshall, etc., et al.,* Civil Number B-77-115, was filed in the same court on April 26, 1977, service was made upon the Indiana officials on October 24, 1978, and the State's Motion to Dismiss is pending.

Indiana is also vitally interested in this appeal since the same reasoning embraced by the United States Court of Appeals for the Fifth Circuit (hereafter Fifth Circuit) in finding that jurisdiction existed over Idaho officials would appear to apply with equal force to Indiana officials in performing their duties under this State's takeover laws. Indiana Code §§ 23-2-3-1 *et seq.* Indeed, Indiana is one of twenty-nine states which have enacted such legislation.

Moreover, numerous Indiana officials who engage in the exercise of state regulatory functions will be susceptible

to *in personam* jurisdiction throughout this country if the decision of the Fifth Circuit, which will no doubt be expanded upon by the district courts in the absence of guidance by this Court, is allowed to stand.

With the ever increasing number of lawsuits facing state governments today, it is imperative that states' attorneys not be compelled to defend such lawsuits all across the nation in any district court that attempts to find jurisdiction.

ARGUMENT

I.

NO PERSONAL JURISDICTION EXISTED OVER THE IDAHO STATE OFFICIALS

The Fifth Circuit conceded that "[b]ecause this suit was brought in Texas, not Idaho, the case . . . raises novel questions of jurisdiction and venue." *Great Western United Corp. v. Kidwell,* 577 F.2d 1256, 1261 (5th Cir. 1978) (hereafter *Kidwell*). It is submitted that the Fifth Circuit's responses to these novel questions were clearly erroneous.

A

The Fifth Circuit Has Unjustifiably Expanded the Fiction Present In *Ex Parte Young*

In *Ex Parte Young,* 209 U.S. 123 (1908), this Court engaged in the fiction that since a state is incapable of authorizing an unconstitutional act, a state would have no interest in a suit alleging that a state official is acting in an unconstitutional manner. 209 U.S. at 159. By engaging in this fiction, the proscriptions of the Eleventh Amendment were avoided by stripping the official of his official character.

By expanding on this Court's reasoning in *Ex Parte Young*, the Fifth Circuit has carried the fiction to its most illogical implication, stating, in *Kidwell*, 577 F.2d at 1265:

> We read *Young* to say that a state official in enforcing an unconstitutional statute is an individual defendant and nothing more. . . .

From that reasoning it would follow that a state would have no interest in defending actions of a state official alleged to be unconstitutional, in any federal forum, regardless of whether that federal forum is in the official's own state or any other state in the nation.

There comes a point when the decision in *Ex Parte Young* must be recognized for what it is—a fiction and nothing more. Obviously, Idaho, Indiana, and all other states of this Union have a strong and vital interest in preserving the constitutionality of their state's laws. This Court would do a great disservice to the States were it to blind itself to the reality of the situation as a result of a fiction which has now turned to fantasy. The necessary fiction of *Ex Parte Young* becomes totally unnecessary as utilized in the context of this action. The Appellee was certainly free to contest the validity of Idaho's takeover statute in an Idaho federal or state court. Instead, it compelled Idaho officials to go to Texas and assert their defense in a federal court there. Legal fictions should only be utilized when necessary. The *amicus* would submit that *Ex Parte Young* strips a state official of sovereign immunity for Eleventh Amendment purposes only within his own state.

B.

The Texas Long Arm Statute Does Not Provide Personal Jurisdiction Over the Idaho State Officials

This Court has on no less than two occasions specifically admonished state courts that the Court's flexible standard of *in personam* jurisdiction as enunciated in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) does not "herald the eventual demise of all restrictions on the personal jurisdiction of state courts." *Hanson v. Denckla*, 357 U.S. 235, 251 (1958); *Kulko v. Superior Court of California*, 436 U.S. 84 (1978). The *amicus* would submit that the time has now come for this Court to reacquaint inferior federal courts with their jurisdictional limitations as well.

Personal jurisdiction over the Idaho state officials in this case was premised upon Federal Rules of Civil Procedure 4(d)(7) and 4(e). Those rules allow personal jurisdiction to be obtained through the "long arm" statute of the forum state. The Texas long arm statute, Tex. Rev. Civ. Stat. Ann. art. 2031 b, § 4, authorizes assertion of personal jurisdiction over nonresidents to the limits of due process. *Jetco Electronic Industries, Inc. v. Gardiner*, 473 F.2d 1228 (5th Cir. 1973).

The boundaries of due process requirements of *in personam* jurisdiction have been explored by this Court beginning in *International Shoe Co. v. Washington, supra.* The constitutional standard as enunciated in that case provides that in order for a state to enter a binding judgment against a nonresident defendant, such defendant must "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Inter-*

national Shoe Co. v. Washington, supra, 326 U.S. at 316, quoting *Milliken v. Meyer,* 311 U.S. 457, 463 (1940). An examination of the Fifth Circuit's decision in light of *International Shoe* and its progeny will be explored below.

In *Hanson v. Denckla, supra,* 357 U.S. at 253, this Court observed that:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State . . . [I]t is essential in each case that there be some act by which the defendant purposefully avails [him]self of the privilege of conducting activities within the forum State . . .

The Idaho officials performed no acts which could arguably be said to demonstrate that they had purposefully availed themselves of the privilege of conducting activities within Texas. To the contrary, the sole action by an Idaho official consisted of writing a letter to Great Western advising it that there were deficiencies in the corporation's disclosure made under the Idaho takeover statute. This letter was in response to Great Western's voluntary filing with the Idaho official. Thus, the sole activity present in this case was a letter written by an Idaho official, in Idaho, concerning Idaho law in response to documents filed by a Delaware corporation whose principal executive offices were located in Texas.

The Fifth Circuit's response to the *Hanson v. Denckla,* requirement that a defendant must have purposefully availed himself of the benefits and protection of the forum's law is something less than satisfying. First, the Fifth Circuit states that the benefits and protection language "should not be read too literally." *Kidwell, supra,* 517 F.2d at 1268, quoting, *Product Promotions, Inc. v. Cousteau,*

495 F.2d 483, 496 (5th Cir. 1973). This Court has never intimated that this langauge is surplusage or is not to be understood to mean what it says. Second, the Fifth Circuit found that, in any event, the *Hanson v. Denckla* requirement was satisfied, speculating that if "the Idaho officials had obtained criminal sanctions [under the Idaho act against Great Western], no doubt the state officials would have expected Texas to honor those criminal judgments." *Kidwell, supra,* 577 F.2d at 1269. Judge Gobald, in dissent, notes that such a "wispy possibility" should not be treated as a jurisdictional factor. 577 F.2d at 1289, note 3. The *amicus* fully concurs in the dissent's remarks and would further note that even if Idaho, or any other state for that matter, seeks assistance from a sister state in seeing that the state's criminal statutes are enforced, such a request for assistance hardly connotes of seeking the benefits and protection of the sister state's laws.

Having seemingly rejected this Court's dictates as enunciated in *Hanson v. Denckla,* the Fifth Circuit adopts a test, although not fully articulated, that provides whenever a defendant's activities in other forums have foreseeable effects in the forum state the minimum contacts test will have been met. 577 F.2d at 1266-1267.

In *Kulko v. Superior Court of California, supra,* this Court rejected the California Supreme Court's reliance upon an "effects" test. This Court noted there that the "effects" test was derived from the American Law Institute's Restatement (Second) of Conflicts § 37 (1971), and stated that "this provision is not binding on this Court, [and] does not in any event support the decision below." 436 U.S. at 96. As was true with the appellant in *Kulko,* the Idaho state officials visited neither physical injury on

either persons or property in the forum state nor did they engage in commercial activity. Rather, the Idaho officials' sole "effect-causing" actions were state regulatory actions.

The Fifth Circuit attempts to limit its decision to the facts of the case due to what it views as the uniqueness of state takeover laws. As ably noted by the dissent, the majority opinion's reliance upon the unique nature of state takeover statutes anticipates the Commerce Clause holding of the court. 577 F.2d at 1291-1292. It is wholly unclear to the *amicus,* however, that the Fifth Circuit limits its finding of *in personam* jurisdiction to the facts involved in the case, for it is obvious that if the court's "foreseeable effects" test is given the broad reading that it can and no doubt will be given, numerous state officials who are mandated under state law to enforce regulations which clearly have foreseeable effects in other forums will be subjected to suit throughout this country. The resulting drain upon state treasuries and personnel will be more than just inconvenient, it will be wholly unreasonable. The *amicus* would accordingly urge the Court to reject the Fifth Circuit's analysis that state regulatory activities of state officials, which activities have foreseeable effects in other forums, provide sufficient minimum contacts with those forums so as to make such officials amenable to suits in the foreign jurisdictions without offending due process.

C.

Enforcement of a State Statute Alleged to be Preempted by the Securities Exchange Act of 1934 Does Not Constitute a Violation of the Act

A second, and independent, basis for jurisdiction found to exist by the Fifth Circuit was based upon Section 27 of

the Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1970). That statute provides in pertinent part:

> Any criminal proceeding [under the Act] may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

The Fifth Circuit held, *Kidwell, supra,* 577 F.2d at 1271, that jurisdiction against the Idaho officials could be premised upon Section 27 since the act "impliedly prohibits a state official from enforcing a statute that conflicts with the 1934 Act." The "violation" which was found to exist by the Fifth Circuit, thus invoking the jurisdictional and venue provisions of Section 27, was based upon the court's strained reading of Section 28 of the 1934 Act, 15 U.S.C. § 78(bb) (1970), which provides:

> Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

The only purpose of the statute appears to be to reserve to the States the power to regulate securities. It is ironic that the Fifth Circuit attaches to the statute an affirmative duty, a violation of which becomes actionable, on the part of state officials to refrain from regulating activity which

conflicts with the provisions of the 1934 Act. There is absolutely nothing in the legislative history or in the language of Section 28 to suggest that an actionable claim is made against state officials when it is alleged that they are enforcing state regulatory schemes in conflict with the 1934 Act. Indeed, Section 28 by its terms prohibits nothing, and the history of the 1934 Act reflects that the purpose of Section 27 was to grant access to a local court for a plaintiff claiming to be the victim of an interstate securities *fraud*. No fraud on the part of the Idaho official was, or could have been, alleged in this action.

Thus, the new action created by the Fifth Circuit has absolutely no support in case law or legislative history, and the *amicus* would submit that the Fifth Circuit's analysis of the 1934 Act appears to be merely an attempt by the Court to bootstrap an unconvincing finding of personal jurisdiction under the Texas long arm statute.

CONCLUSION

For the foregoing reasons, the *Amicus*, State of Indiana, respectfully urges that this Court reverse and vacate the decision of the Fifth Circuit.

Respectfully submitted,

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